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90-1217

Supreme Court, U.S.
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JAN 28 1991
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1990

Shirley M. Kearing,
Petitioner,

v.

The Honorable S. Martin Teel, Jr., et al,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
For the District of Columbia

# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Since a conflict exists between the 4th Circuit's avouchment of Article I bankruptcy courts possessing certain contempt powers and the 5th and 9th Circuits' adamantine determination that contempt power is exclusively a power exercised only by an Article III court, was the petitioner's "due process" right guaranteed by Amendment V of the United States Constitution violated by her arrest and incarceration for contempt by a bankruptcy judge?

2. Does the United States Trustee, as enacted under Pub.L. 99-554 (cited as "Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986), accede to the concept of "separation of powers" within the Constitutional framework?

3. May the Federal Rules of Civil Procedure and Rules of Bankruptcy Procedure be controverted as mere oversight or technical error?

4. Does the "heightened pleading standard" mandated in Dewey v. University of New Hampshire, 694 F.2d 1 (1982) comport with Conley v. Gibson, 355 U. S. 41, 78 S.Ct. 99, 2 L.Ed2d 80 (1957) and Haines v. Kerner, 404 U. S. 519, 92 S.Ct. 594, 30 L.Ed2d 652 (1972)?

5. Is there a legally appointed and duly qualified trustee in this proceeding who could institute contempt proceedings and then prosecute in light of Young v. United States ex rel. Vuitland et Fils, S.A., 481 U.S. 787, 107 S.Ct. 2124, 95 L.Ed.2d 740 (1987)?

6. Are the requirements of §322 of Pub.L. 98-353, July 10, 1984, 98 Stat. 333 and §283(aa) of Pub.L. 99-554, October 27, 1986, applicable to individuals under Title 11, Chapter 11?

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11 U.S.C. 330

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PETITION FOR WRIT OF CERTIORARI TO
The United States Court of Appeals
For the District of Columbia

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States

Shirley M. Kearing, the petitioner herein, respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the District of Columbia entered in this case.

## OPINIONS BELOW

The October 10, 1990, order of the United States Court of Appeals for the District of Columbia Circuit, whose decision is herein sought to be reviewed, is found in Appendix

A, Court Orders & Opinions Sought to Be Reviewed as are all other orders and memorandum from the district court and the bankruptcy court.

## JURISDICTION

The order of the United States Court of Appeals for the District of Columbia was entered on October 10, 1990. A timely petition for rehearing was filed on October 17, 1990. The Court of Appeals for the District of Columbia denied rehearing on October 29, 1990. The jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 U.S.C. Section 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following are the citations of the constitutional and statutory provisions involved in the present case:

U. S. Const. art I, Sec. 1; U. S. Const.

art II, Sec. 1; U. S. Const. art III, Sec. 1; U. S. Const., amend. V [1791]; U. S. Const. art. I, Sec. 8, cl.4.; Section 322 of Pub.L. 99-353, July 10,1984; Section 283(aa) of Pub.L. 99-554, October 27, 1986; 11 U.S.C. 101(13)(A); 11 U.S.C. 101(30)(A); 11 U.S.C. 101(39); 11 U.S.C. 105; 11 U.S.C. 322(a); 11 U.S.C. 326(d); 11 U.S.C. 327(a); 11 U.S.C. 328(c); 11 U.S.C. 329(b); 11 U.S.C. 330; 11 U.S.C. 363(m); 11 U.S.C. 503(b)(1)(A); 11 U.S.C. 503(b)(2); 11 U.S.C. 521(3); 11 U.S.C. 1102(a)(1); 11 U.S.C. 1104(a); 11 U.S.C. 1104(b); 11 U.S.C. 1104(c); 11 U.S.C. 1106(a); 11 U.S.C. 1107; 11 U.S.C. 1129(b)(2)(B); 18 U.S.C. 1961(1)(D); 28 U.S.C. 157(a); 28 U.S.C. 157(b)(1); 28 U.S.C. 157(b)(2)(A); 28 U.S.C. 158(a); 28 U.S.C. 157(d); 28 U.S.C. 332(d)(1); 28 U.S.C. 372(c); 28 U.S.C. 566(a); 28 U.S.C. 586(a)(3)(A); 28 U.S.C.

586(a)(3)(B); 28 U.S.C. 586(a)(3)(F); 28 U.S.C. 586(a)(3)(G); 28 U.S.C. 586(A); 28 U.S.C. 586(B); 28 U.S.C. 586(F); 28 U.S.C. 586(G); 28 U.S.C. 1334(b); 28 U.S.C. 1334(c)(1); 28 U.S.C. 1334(c)(2); and 28 U.S.C. §1983.

## STATEMENT OF THE CASE

This appeal emanates from Petitioner's allegations of illegal arrest and incarceration pursuant to a contempt order of the bankruptcy court for the District of Columbia. The bankruptcy court (Teel, J.) found Appellant in contempt of court after ordering her to comply with an appointed, but as of yet unqualified, trustee's motion to compel her cooperation. She refused not only to recognize the legality of that so-called trustee (thus his standing in the bankruptcy court), but she also refused to cooperate with him.

Utilizing Rule 9020 of the Rules of

Bankruptcy Procedure, the bankruptcy court instructed Petitioner to surrender herself to the United States Marshall or face arrest. The bankruptcy court extended Petitioner's time to file objections to a contempt order to October 24, 1988; however, on October 14, 1988, at 3:15 p.m. the United States Marshals arrested Petitioner.

Petitioner filed a complaint for damages (illegal arrest) against the bankruptcy judge and his clerk, the United States Trustee and his assistant, the so-called trustee, his attorney and his attorney's law firm with jurisdiction pursuant to the United States Constitution, Amendment V, and 42 U. S. C. 1983. An amended complaint later added the United States Marshal and three of his deputies.

Petitioner's amended complaint alleges that all respondents

> ..."under color of law" ... through malfeasance, misfeasance and nonfeasance of duty, did cause a tortious act by violating plaintiff's guaranteed fundamental protection of due process of law by consummating an illegal arrest and incarceration of the above-named plaintiff in blatant and malicious use of process in direct violation of the Constitution of the United States."

The lower courts held that the Petitioner's amended complaint failed to state a claim upon which relief may be granted pursuant to 12(b)(6) of the Federal Rules of Civil Procedure. The District Court also held that the plaintiff had failed to state a constitutional tort claim. Specifically, that court concluded that no claim existed under 42 U. S. C. 1983 because the amended complaint failed to allege any action by any person under color of state law. The District Court also found the amended complaint failed to state a Bivens claim against any of the federal appellees or against the non-federal defendants. That

court held that the so-called trustee took actions as trustee [a presumption that a legitimately appointed and qualified trustee was in place], a party to litigation that led to the contempt order against the plaintiff; therefore, "[t]his was not conduct under color of law and thus not a due process violation." And, the court continued on in a footnote

> A suit against a bankruptcy trustee for quasi-judicial actions, as opposed to actions undertaken as a party to litigation, would be subject to dismissal on immunity grounds. See Mullis v. U. S. Bankruptcy Court for the District of Nevada, 828 F.2d 1385 (9th Cir. 1987).

The district court dismissed the claim against the United States Trustee and his assistant for failure to meet the "heightened pleading" standard for a Bivens action. Moreover, the court held that the bankruptcy judge was entitled to absolute immunity under Bradley v. Fisher, 80 U. S. 335 (1871) and Stump v. Sparkman, 435 U. S.

349 (1978) since he was empowered to hold Petitioner in contempt [whether it be civil or criminal or both has never been determined by anyone] under Bankruptcy Rule 9020 and therefore did not act in the clear absence of all jurisdiction. The clerk of the bankruptcy court and the marshals were also held to have judicial immunity since their actions were closely associated with the judicial process. Nothwithstanding that, the marshals were entitled to at least qualified immunity under Harlow v. Fitzgerald, 457 U. S. 800 (1982).

Both lower courts continued that case law makes clear that the action must be dismissed "[i]f a plaintiff fails to allege direct evidence of unconstitutional intent and " ... such intent must be pleaded with specific, discernible facts or offers of proof that constitutes direct as opposed to merely circumstantial evidence of intent."

This reflects the district court's opinion in decisions of Whitacre v. Davey, 890 F.2d 1168, 1171 n. 4 (D.C. Cir. 1989) and Seigart v. Gilley, slip. op. at 9 (D.C. Cir. February 9, 1990) [Now cited as Seigart vs. Gilley, 895 F.2d 797 (D.C. Cir. 1990)].

Based on these findings, the Courts dismissed this case; this petition follows.

It is a sad day, indeed, in the annals of American jurisprudence when a court of appeals grants, with temerity, summary affirmance of a district court order denying the full protections afforded Petitioner by the Constitution of the United States whilst knowing "... how deficient [the appeal court's] procedures are in granting motions for summary affirmance ...." United States v. Glover, 731 F.2d 41, 48 et seq. (1984).

It is an insult to this Petitioner -- a

law-abiding and taxpaying citizen -- that the appeals court, in making short shrift of her appeal with such cursory treatment, totally ignored a meritorious complaint and released an order such as this

> The issue of whether the bankruptcy court has civil contempt powers has not been decided by this circuit. It is not necessary to resolve that issue here for appellant otherwise failed to state a claim against the appellees. The merits of the parties' positions are so clear as to justify summary action.

Nothing of the sort is "so clear."

> On summary judgment the inferences to be drawn from the underlying facts contained in such materials must be viewed in light most favorable to the party opposing the motion. Walker v. Washington, 627 F.2d 541 (1980) cert. denied 449 US 994.

Just what did the appeals court think the Petitioner was doing up in that court anyway? Was it not that she was arrested and incarcerated upon actions initiated by a legally questionable individual, who, operating under the guise of being a duly

appointed and legally qualified trustee convinced an Article I bankruptcy judge who knew (since, inter alia, the Petitioner in open court, beforehand, advised him of such) that he did not have the power to arrest or incarcerate anyone for any reason yet did otherwise? See In Re Omega Equipment Corp., 51 B.R. 569 (Bkrtcy. DC DC 1985) which happens to be the controlling case law on this bankruptcy judge for the D. C. Circuit.

The per curiam opinion of the appeals court "cannot erase the fact that major aspects of the normal appellate process are absent from this appeal." See United States v. Glover, 731 F.2d 41 (1984). For example:

(1) There was no oral argument. Id.;

(2) There is indication that this appeals court, once again, intends avoidance of either confirming or denying a lower court decision affirming Petitioner's contention that all contempt powers of an

Article I bankruptcy judge for the District of Columbia are nil and without those powers Petitioner was, indeed, denied her "due process" rights ;

(3) There was no tradional collegiality of the decisional process normal to a multi-member appellate court. Id.;

(4) Petitioner's appeal has not received the full attention of the court -- the attention it should have received ab initio; most significantly, once the motion for summary affirmance has been granted, the case has been decided on its merits. Id.

However, Petitioner has clearly raised a viable claim for relief and that dismissal and summary affirmance was not, and is not, warranted. Since the courts are "a public business," Petitioner believed her appeal goes to the essence of the appellate process and requires a "public airing."

To begin with, Harlow v. Fitzgerald, 457 U. S. 800, 818, as a first step in considering a defendant's liability, instructed the trial judge to determine

"whether [currently applicable] law was clearly established at the time an action occurred. This was never done. The District Court was correct in that it must not dismiss the complaint unless the plaintiff can prove no set of facts which would entitle her to relief. See Conley v. Gibson, 355 U. S. 41 (1957). Yet the lower courts totally ignored the "standard" presented in Haines v. Kerner, 404 U. S. 519 (1972), that it does not appear "beyond doubt that [Petitioner] can prove no set of facts in support of her claim which would entitle [her] to relief." Crisafi v. Holland, 655 F.2d 1305, 1309 (1981).

Pleadings are intended to serve as a means of arriving at fair and just settlements of controversies between litigants. They should not raise barriers which prevent achievement of that end. Maty v. Grasselli Co., 303 U. S. 197

(1938).

As Justice Black so aptly stated in Conley v. Gibson, 355 U. S. 41, 47:

> The decisive answer to this is that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is "a short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. The illustrative forms appended to the Rules plainly demonstrate this. Such simplified "notice pleading" is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues. Following the simple guide of Rule 8(f) that "all pleadings shall be so construed as to do substantial justice," we have no doubt that petitioners' complaint adequately set forth a claim and gave the respondents fair notice of its basis. The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.

Too, "[p]roper pleading is important, but

its importance consists in its effectiveness as a means to accomplish the end of a just judgment. Maty v. Grasselli Co., 303 U. S. 197 (1938).

"[The] district court dismissed ... complaint on the ground that it did not state a claim for which relief could be granted. The appeals court concurred. This is a dubious practice ...." Dewey v. University of New Hampshire, 694 F.2d 1, 3 (1982).

In dismissing the Petitioner's complaint, the district court also stated that the Petitioner had not complied with the "heightened pleading" standard. Yet, even though the district court might be forgiven, the appeals court should not:

> Dismissal of a claim requires the most close analysis by an appellate court, balancing the overall liberal thrust of the simplified civil rules on the one hand, see generally 5 Wright & Miller, Federal Practice and Procedure, Sections 1216, 1357, against the repeated demands by ... courts that

there be more than conclusory allegations, even in civil rights cases. Dewey v. University of New Hampshire, 694 F.2d 1, 3 (1982).

Therefore, although we must ask whether the "claim" put forward in the complaint is capable of being supported by **any conceivable set of facts**, we insist that the claim at least **set forth minimal facts**, not subjective characterizations, **as to who did what to whom and why**. [Emphasis added]. See Dewey v. University of New Hampshire, 694 F.2d 1, 3 (1982).

This demand, however, as set out in a dissenting opinion in Siegert v. Gilley, 895 F.2d 797, 806-807 (D.C. Cir. 1990), should give pause:

It is worth remembering that our heightened pleading standard has not as yet even been explicitly approved by the Supreme Court.

And finally, even if the arrest and incarceration of the Petitioner was inadvertent:

... judges are not absolutely immune from liability and damages for administrative, legislative, or executive functions that judges may occasionally be assigned by law to perform; it is nature of function

performed --adjudication --rather than identity of actor who performed it -- judge -- that determines whether absolute immunity attaches to act. Forrester v. White, 108 S.Ct. 538 (1988)

Petitioner and her husband (hereinafter referred to jointly as the "Kearings") are currently in a joint-petition bankruptcy proceeding.

Their financial difficulties began in early 1986 after they increased secured loans on their real property, incurred excessive consumer debt and made an imprudent investment in three (3) condominium units.

Petitioner does not believe that they are, in fact, legally in bankruptcy proceedings since the requirements of Section 322 of Pub.L. 99-353, July 10, 1984, Section 283(aa) of Pub.L. 99-554, October 27, 1986, F.R.Civ.P. 11 and Bankruptcy Rule 9011 were totally disregarded. Petitioner believes that the

following grievous and callous errors, mistakes, and unadulterated insanity that has occurred in this case are most pertinent for the likelihood of success before this Court; to wit: the United States Trustee never complied with his duties, pursuant to 11 U.S.C. 1102(a)(1), by his failure to appoint a committee of unsecured creditors -- regardless of his lame excuse in not believing that any could or would serve; he never complied with his duties, pursuant to 28 U.S.C. 586(a)(3)(A), by failing to monitor or investigate applications for compensation and reimbursements allowed or applied for under 11 U.S.C. 326, 328, 329, 330, and Rule 2016 of the Rules of Bankruptcy Procedure; he never complied with his duties, pursuant to 28 U.S.C. 586(a)(3)(B), by failing to monitor any plan of reorganization and to ascertain why no disclosure statement was,

or has been, ever filed when the Kearings, as debtors-in-possession, did file one; he never complied with his duties, pursuant to 28 U.S.C. 586(a)(3)(F), by his failure to notify the appropriate United States Attorney of matters which constitute a crime under the laws of the United States; and, he never complied with his duties, pursuant to 28 U.S.C. 586(a)(3)(G), by failing to monitor the progress of this case and to assure that all officers of the Court are adhering to the Code of Professional Conduct as determined in In re Smith, 5 B.R. 92 (Bkrtcy. D. DC 1982).

The Clerk of the Bankruptcy Court for the District of Columbia has failed miserably to perform his duties under Rule 9011 and 2013 of the Rules of Bankruptcy Procedure -- even though the Kearings have ask not only the district court but the appeals court also to issue a writ of

mandamus to force his performance.

The Kearings, as debtors-in-possession, fully complied with their fiduciary duties in this proceeding and could not be removed as debtors-in-possession since the Bankruptcy Court sent no notice and held no hearing as required by 11 U.S.C. 1102, received no testimony, entered no evidence, neither analyzed nor weighed any cost/benefits or cost/protection for appointment of a trustee; yet, the Bankruptcy Court found "cause" even though there had been no fraud, dishonesty, incompetence or gross mismanagement on the part of the Kearings and that the expense and inconvenience of a trustee was, and is, an adverse factor to any successful reorganization of this bankruptcy proceeding.

It is abominable that neither an examiner was appointed in this proceeding

as requested under 11 U.S.C. 1104(b)(1) by the Kearings in an application for an expedited hearing for such an appointment nor was any notice or hearing forthcoming from that application.

Regardless, the appointment of a trustee was totally inappropriate since no notice was given and no hearing on any motion for that appointment as mandated by 11 U.S.C. 1102 was held.

REASONS FOR GRANTING THE WRIT

Petitioner contends that the lower courts erred in that they did not allow her to invoke the pro se protection found in Haines v. Kerner, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed2d 652 (1972); found that she failed to state a "Bivens claim" (Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), even though her complaint alleged that the individuals named, ACTING ("under color of

law") IN AN OFFICIAL CAPACITY, violated her due process rights; stated that she failed to state a "claim" under Rule 12(b) of the Federal Rules of Procedure when, in fact, she defined the actions taken against her as "malfeasance, misfeasance and nonfeasance of duty" along with "blatant and malicious use of process" in denying her guaranteed fundamental protection of "due process"; found that the United States Bankruptcy Judge for the District of Columbia has contempt powers under Rule 9020 of the Bankruptcy Rules of Procedure, notwithstanding the "Omega ruling" as found in In Re Omega, 51 B.R. 569 (D.C. 1985); assumed that there is a legally appointed and duly qualified trustee in this bankruptcy proceeding who has authority to present a motion for show cause for contempt and seek sanctions by the Bankruptcy Court under Rule 9020 of the

Bankruptcy Rules of Procedure and that trustee and his attorneys are "quasi-judicial" officials; stated that her arrest and incarceration was due to negligence thereby avoiding a constitutional tort claim under 42 U.S.C. Section 1983; found that the United States Trustee and the assistant United States Trustee were only involved in the appointment of the so-called trustee; and, that it in and of itself "do[es] not amount to a specific allegation of constitutional violation" when 11 U.S.C. 1104(c), 28 U.S.C. Section 586(A),(B),(F) and (G), and In re Smith, 5 B.R. 92 (Bkrtcy. D. DC 1982), proscribe otherwise; found that the she failed to state a Respondeat Superior claim against the United States Trustee and the United States Marshal in light of what Haynesworth v Miller, 820 F.2d 1245 (DC Cir. 1987), at 1262 [13] and footnote 139, page 1263 said;

found that she failed to meet the "heightened pleading standard" by alleging violation of "due process" under the Fifth Amendment of the Constitution of the United States leading to illegal arrest and incarceration -- that in and of itself being a "specific deprivation of her rights" that are "clearly established," when viewed in light of In Re Omega, supra, which prohibits, unequivocally, the very actions that were undertaken and then accomplished; contorted the use of Bradley v. Fisher, 80 U.S. 335 (1871) and Stump v. Sparkman, 435 U.S. 349, given the Supreme Court's explanation and example in Stump at p. 356-7 along with citing from Bradley, 13 Wall., at 352, when the "Omega ruling" in the District of Columbia explicitly states that an Article I judge dealing with contempt in the District of Columbia wanders into pastures exclusively reserved

for Article III adjudication; and, is an Article I judge in the District of Columbia absolutely immune" when he knew, **IN ADVANCE**, that there is a "clear absence of **ALL** jurisdiction" for contempt sanctions by him; and decided that the Clerk of the Bankruptcy Court for the District of Columbia and United States Marshals for the District of Columbia were under "mistaken belief" that they were carrying out a valid contempt order of the United States Bankruptcy Court for the District of Columbia by causing her to be arrested on October 14, 1988, and thereby they were protected by 28 U.S.C. Section 566(a) and therefore "absolutely immune" even when taken in context with Haynesworth, supra.

## CONCLUSION

This entire proceeding has become such a "travesty of justice" that the chilling effect on bankruptcy practice throughout

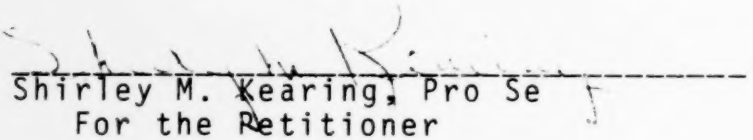
this country is in jeopardy if these gross irregularities are allowed to germinate, sprout and spread.

The bankruptcy process is a structured, basically administrative, field governed by constitutional and statutory law with definitive restrictions placed upon all the participants.

But this proceeding has become such a glaring example of "inside players making up the rules as they go along" that only the myopic would be remiss to encounter the utter contempt and disregard these "players" have had of the Petitioner's right to "due process" under the law as guaranteed by Amendment V of the United States Constitution and all the other myriad laws, procedures and protections that rightfully should be afforded her and others who haplessly wander into the quagmire of bankruptcy only to realize too

late that the courts -- in the Petitioner's case particularly -- have refused commitment to "equal justice under law" which only reinforces the Petitioner's belief that "[a] casual attitude toward human hurt and pain is the surest sign ... [of] the beginning of the end of a free society."

Respectfully submitted,



Shirley M. Kearing, Pro Se
For the Petitioner

## AFFIDAVIT OF SERVICE

I, Shirley M. Kearing, depose and say that I am the petitioner in the foregoing case, and that on January 28, 1990, pursuant to Rule 28.5(c), Rules of the United States Supreme Court, I personally served three (3) copies of the foregoing "Petition for Writ of Certiorari," consisting of 29 pages, along with Appendices A, B, C, and D, on each of the parties required to be served as follows:

Honorable Kenneth W. Starr
Office of Solicitor General
Department of Justice
Room 5143
10th & Constitution Avenue, N. W.
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Jay B. Stephens, Esq.
U. S. Attorney for the District of Columbia
555 4th Street, N.W.
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Peter R. Kolker, Esq.
1201 Connecticut Avenue, N. W.
Washington, D. C. 20036

All parties required to be served have been served.

Shirley M. Kearing
SHIRLEY M. KEARING, Petitioner

Subscribed and sworn to before me on the 23rd day of ~~December, 1990.~~ JANUARY 1

Notary Public, DC

My Commission Expires January 14, 1992